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No. 06-5754

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VICTOR A. RITA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Was the district court's choice of within-Guidelines sentence reasonable?

2. In making that determination, is it consistent with *United States* v. *Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?

3. If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?

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The opinion of the United States Court of Appeals for the Fourth Circuit is reprinted in the Joint Appendix at J.A. 112-113. It is also available at 177 Fed. App'x 357, 2006 WL 1144508.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on May 1, 2006. J.A. 114. The petition for a writ of certiorari was filed on July 28, 2006, and granted on November 3, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury...."

The relevant portions of the Sentencing Reform Act, as amended, 18 U.S.C. §§ 3553(a) & (c), 3661; 28 U.S.C. §§ 991, 994, and of the Speedy Trial Act, 18 U.S.C. § 3162(a)(2), are included as an appendix to this brief.

STATEMENT OF THE CASE

Victor A. Rita, Jr., a father and a distinguished veteran of two foreign wars, was sentenced to a lengthy term of imprisonment based on two statements made to a federal grand jury. The subject of the grand jury's investigation was InterOrdnance of America, Inc., a licensed firearms retailer. J.A. 16; Sealed J.A. 119. Agents with the Bureau of Alcohol, Tobacco and Firearms (ATF) determined that one of the products offered by InterOrdnance – a "parts kit" for a "PPSH 41," a vintage battle rifle used by various militaries during

World War II[1] – should be classified as a "machine gun" and restricted from sale under federal law. J.A. 18-19; Sealed J.A. 119. Mr. Rita had previously purchased one of these kits, and was called to testify before the grand jury as to his interactions with company representatives. J.A. 18-19.

During his testimony, Mr. Rita was asked whether he had spoken with representatives of InterOrdnance after being contacted by the ATF concerning the recall of PPSH kits. He replied no. J.A. 10; Sealed J.A. 119-22. He was then asked whether the ATF had requested that he surrender his PPSH kit. He replied no. *Id.* The government contended that this information conflicted with telephone records and statements obtained by investigating ATF agents. Sealed J.A. 120-21.

These two brief exchanges gave rise to a five-count indictment against Mr. Rita: two counts of making false declarations in violation of 18 U.S.C. § 1623(a), two counts of making false statements in violation of 18 U.S.C. § 1001(a)(2), and one count of obstructing justice in violation of 18 U.S.C. § 1503. J.A. 7-13. Mr. Rita argued, during a two-day jury trial, that his answers before the grand jury were sincere and responsive to the questions asked. J.A. 42, 80-81, 85. The jury, however, returned a verdict of guilty on all counts. J.A. 2; Sealed J.A. 121-22.

A presentence investigation report was prepared in advance of sentencing. Sealed J.A. 116. It advised that Mr. Rita should be assigned no criminal history points, that his base offense level should be 14, and that no aggravating characteristics were present that might warrant an upward adjustment under the United States Sentencing Guidelines.[2] Sealed J.A.

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[1] A "parts kit" is a collection of components that may be assembled into a replica – generally inoperable – of the subject firearm. J.A. 41.

[2] *See U.S. Sentencing Guidelines Manual* §§ 2B1.1, 2J1.2, 2J1.3 (2004) ("*Guidelines*"). The offenses of conviction were grouped for Guidelines purposes, and the highest offense level (14) was applied. *See id.* §§ 3D1.2, 3D1.3.

123-26. Nevertheless, the report asserted that the offense level should be increased from 14 to 20 based on a Guidelines cross-reference directing that Mr. Rita was an "accessory after the fact" to supposed violations *by InterOrdnance* of 22 U.S.C. § 2778(b)(2), which prohibits the import and export of certain firearms.[3] Sealed J.A. 122-25. This six-level enhancement – imposed even though (i) the issue was neither submitted to the jury nor proved beyond a reasonable doubt, and (ii) the purported import/export violation by InterOrdnance was neither mentioned in the indictment nor raised in the jury instructions, see J.A. 7-13, 25-39 – doubled the range of imprisonment recommended under the Guidelines, from 15 to 21 months to 33 to 41 months. Sealed J.A. 122-25, 132-33.

Mr. Rita argued for a sentence below the recommended range, based on both the departure provisions of the Guidelines and the statutory factors enumerated in 18 U.S.C. § 3553(a). J.A. 2, 40-47. He identified three primary grounds for the request: his military and civil service, his physical impairments, and his vulnerability to victimization in prison. J.A. 40-47; see *id.* at 64-65. The record amply supports these claims.

For over 25 years, from 1966 to 1992, Mr. Rita served in the United States Marine Corps, the United States Army, and the United States Army Reserve. His service included tours of duty in the Vietnam and Gulf Wars, and he has received more than 35 awards and medals for distinguished conduct. Sealed J.A. 129; J.A. 63, 65-64. After his military career, he worked as a criminal investigator and asylum officer with the Immigration and Naturalization Service and the Bureau of Immigration and Customs Enforcement. Sealed J.A. 128-29; J.A. 63-66.

His service to his country resulted in serious physical ailments. His right foot was crushed by a vehicle during the

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[3] *See Guidelines* §§ 2J1.2(c)(1), 2J1.3(c)(1), 2X3.1.

Gulf War. Sealed J.A. 127; J.A. 70-73, 78-79. He was exposed to Agent Orange during the Vietnam War, which continues to produce skin rashes and infections that require perpetual care. Sealed J.A. 127; J.A. 70-73, 78-79.

Mr. Rita also has diabetes, which causes periodic numbness in the feet as well as memory and eyesight loss. Sealed J.A. 127; J.A. 69. He suffers from arthritis, an enlarged prostate, acid reflux, a herniated disk, and sleep apnea. Sealed J.A. 127; J.A. 68. To treat these conditions, Mr. Rita – who is 59 years old – requires a long list of prescription medications as well as a CPAP (continuous positive airway pressure) machine to assist in nightly breathing. Sealed J.A. 127; J.A. 56, 73.

His years of government service also left Mr. Rita vulnerable to victimization in prison. He was, while employed by the INS, responsible for investigating crimes and assisting in prosecutions. Sealed J.A. 129; J.A. 64-65. His duties included offering testimony and presenting evidence in open court to secure criminal convictions. J.A. 61-62. As a result of these efforts, Mr. Rita has been threatened repeatedly with injury and death. *Id.* at 45-46, 61-62.

Under binding Fourth Circuit precedent, however, the district court was prevented from giving adequate consideration to these factors. It thereby viewed itself as presumptively bound by the range recommended under the Guidelines, and so determined, without explanation, that the record did not provide an adequate basis for deviation from that range. J.A. 86-87. It offered only the following short assessment of the record:

> The Court has reviewed the sentencing guidelines with respect to the charges here of Title 18 of USC 1623, making a false declaration, 18 USC 1001 and 1503, and the Court finds those to be serious matters.
>
> The Court is not able to evaluate the seriousness of the criminal investigation which was going on of which the

> Government considered Mr. Rita to have some important testimony and felt that Mr. Rita did not give truthful testimony to.
>
> The Court is unable to find that the sentencing guideline range which is set forth there that we've already discussed is an inappropriate guideline range for that, and under 3553, certainly the public needs to be protected if it is true, and I must accept as true the jury verdict that Mr. Rita violated the laws that he is accused of violating, all five of them.

Id. The district court then imposed a sentence of imprisonment of 33 months, at the low end of the Guidelines range as enhanced by Mr. Rita's purported "accessory after the fact" status. *Id.* at 87.[4]

The Fourth Circuit affirmed the judgment in an unpublished, per curiam opinion. It held that a sentence within the Guidelines range is "presumptively reasonable" and determined, without analysis, that the district court had adequately considered the factors set forth in § 3553(a). J.A. 113.

SUMMARY OF ARGUMENT

This case presents fundamental questions about the legal rules governing federal sentencing in the wake of *United States* v. *Booker*, 543 U.S. 220 (2005). The district court placed undue weight on the Guidelines and imposed sentence without articulating, on the record, its consideration of the factors enumerated in 18 U.S.C. § 3553(a), as plainly required by § 3553(c). The resulting sentence was procedurally and substantively unlawful.

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[4] The sentencing transcript reveals that the district court credited Mr. Rita's claims of medical problems related to Agent Orange. It requested that the Bureau of Prisons place Mr. Rita in a facility that could treat "the condition of Agent Orange or any other condition [with] which Mr. Rita may be affected" and decided not to impose a fine based on "an abundance of caution and care about this Agent Orange business." J.A. 87, 89.

The Fourth Circuit nonetheless affirmed, based on its holding that "a sentence imposed 'within the properly calculated Guidelines range ... is presumptively reasonable.'" J.A. 113. As this case well illustrates, a presumption of reasonableness for within-Guidelines sentences is an abdication of the responsibility of the court of appeals to determine if the district court undertook reasoned consideration of the § 3553(a) factors. Such a presumption relieves both the district court and the government of their obligations to explain why the sentence imposed is lawful.

As a textual matter, a presumption of reasonableness for within-Guidelines sentences is plainly inconsistent with the Sentencing Reform Act. The Act directs the district court to consider all relevant factors and to impose the sentence that, in its judgment, is "sufficient but not greater than necessary" to satisfy the enumerated purposes of sentencing. To accord presumptive weight to a single factor – the recommended Guidelines range – is to denigrate all others and disregard the plain statutory command. And consideration of the Guidelines range cannot substitute for consideration of the other factors enumerated in § 3553(a). The only manner in which a district court can honor its obligations under the Act is to give equal and independent consideration to all of the factors of § 3553(a) and exercise reasoned judgment to impose a sentence, as informed by the statutory factors, that is no greater than necessary to advance the relevant purposes of sentencing.

Nor is it permissible for a court of appeals to rely upon a presumption of reasonableness when reviewing a judgment of sentence. This Court held in *Booker* that a sentencing system that restrains the discretion of district courts to impose non-Guidelines sentences is unconstitutional, and it accordingly excised the provisions of the Sentencing Reform Act mandating adherence to the Guidelines. The Court further emphasized that the standard of review for all sentences, whether within or outside the Guidelines range, should be reasonable-

ness "across the board." A presumption of reasonableness, when applied to the review of sentences on appeal, simply resurrects the system rejected in *Booker*. Even if the presumption is technically rebuttable (though, as this case indicates, the presumption may be irrebuttable as a practical matter), such a presumption signals to district courts that their sentences are subject to two different tracks for review: practically guaranteed affirmance for sentences within the Guidelines range, and substantially increased risk of reversal for all others, particularly those below the Guidelines range. The effect is readily predictable: a *de facto* restraint on lower courts causing them to return to the pre-*Booker* mandatory Guidelines regime.

Indeed, a review of post-*Booker* decisions of the courts of appeals reveals that this is precisely what is occurring. Courts of appeals are overwhelmingly supportive of within-Guidelines sentences. The lower courts are ignoring both *Booker* and the non-Guidelines factors that the Sentencing Reform Act specifically enumerates as relevant to sentencing in favor of a controlling presumption of reasonableness for within-Guidelines sentences.

Finally, however this Court rules with respect to the presumption of reasonableness, no sentence can be affirmed unless the district court adequately explains its rationale. The Sentencing Reform Act directs that the district court must "consider" all relevant factors in imposing sentence and must provide a statement of reasons for each sentence (per § 3553(c)), regardless of where the sentence lies within the statutory range. This required explanation is the only way that appellate review can ensure compliance with the legal standards for sentencing set forth in § 3553(a). Without an explanation, there is no basis for an appellate court to conclude that the district court exercised its discretion with respect to the factors that it is required to consider under § 3553(a). Even a presumption of reasonableness cannot

validate a sentence that is not supported by the requisite statement of reasons.

All of these problems infect the sentence in this case. The district court gave controlling weight to the range recommended by the Guidelines and ignored factors that strongly supported a lesser sentence. The court of appeals compounded the error by affirming the sentence based solely upon a presumption of reasonableness, reinforcing the district court's cramped view of its discretion and violating the central tenet of *Booker*. And it did so in the absence of an adequate statement of reasons, in clear contravention of the Sentencing Reform Act. The judgment of the court of appeals should be reversed and the sentence imposed by the district court should be vacated as unreasonable.

ARGUMENT

I. THE CHOICE OF SENTENCE WAS NOT REASONABLE ON THIS RECORD.

The plain language of the Sentencing Reform Act provides unambiguous instructions for sentencing judges: A district court "shall consider" all of the factors listed in § 3553(a) and "shall impose," based on those considerations, a sentence that is "sufficient, but not greater than necessary," to satisfy the purposes set forth in § 3553(a)(2). The district court in this case ignored several relevant factors and, by defaulting to the range specified by the United States Sentencing Guidelines, failed to impose a sentence consistent with the standards set forth in § 3553(a). Mr. Rita's sentence is unreasonable and should be reversed.

A. The Plain Meaning Of § 3553(a) Requires Full Consideration Of All Relevant Factors And Imposition Of The Sentence That Is "Sufficient But Not Greater Than Necessary" To Comply With The Statutory Purposes Of Sentencing.

Section 3553(a) includes two distinct directives. The first instructs that, in assessing the appropriate punishment, district courts "shall consider" the series of factors and purposes listed in paragraphs (1) through (7). The second states that district courts "shall impose" the sentence that is "sufficient, but not greater than necessary," to satisfy the purposes set forth in § 3553(a)(2). These directives are mandatory, see *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' ... normally creates an obligation impervious to judicial discretion ...."), and the district court must comply with both statutory mandates for its choice of sentence to be "reasonable," see *Booker*, 543 U.S. at 261.

1. The first directive of § 3553(a) states that the district court "shall consider" the enumerated factors and purposes in determining the sentence to impose. This is a straightforward command. The district judge is instructed to assess and evaluate – to "reflect on" and "contemplate," see *Webster's Third New International Dictionary* 483 (1993) (defining "consider") – these matters in crafting the final sentence.

The statute permits no exception. It unequivocally mandates that the district court consider each enumerated factor and purpose. 18 U.S.C. § 3553(a). A court is no more free to ignore one of these provisions than it would be to ignore any other, or the statute altogether. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here ... the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)); see also *Booker*, 543 U.S. at 304-05 (Scalia, J., dissenting in part) ("The statute provides no order of priority among all th[e] factors ...."). A

sentence imposed without consideration of all relevant factors and purposes of § 3553(a) is, quite simply, invalid. See *United States* v. *Johnson*, 467 F.3d 559, 563, 566 (6th Cir. 2006); *United States* v. *Cooper*, 437 F.3d 324, 329-30 (3d Cir. 2006); *United States* v. *Webb*, 403 F.3d 373, 383 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1110 (2006).

It is incorrect to suggest, as some courts have, see, *e.g.*, *United States* v. *Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc), that considering the Guidelines range serves as a proxy for consideration of the other factors and purposes of § 3553(a). To do so is to ignore the other expressly delineated statutory factors, rendering them superfluous. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought ... to be construed that ... no clause, sentence, or word shall be superfluous, void, or insignificant."). If Congress had thought the Guidelines captured all relevant considerations, there would have been no reason to identify and list separately the six other factors in § 3553(a). Yet Congress did not only that, but it specifically mandated that courts "consider" *all* of the factors, not just the Guidelines.

The Guidelines cannot substitute for the other individualized factors listed in § 3553(a) because they are generalizations. They provide a series of arithmetical functions and tables, based on the assignment of numerical values to defined categories of conduct and defendants. The recommended range is nothing more than a product of those equations, a set of numbers reflecting the collective judgment of other individuals – not the judge presiding over sentencing – as to the typical impact and import of certain conduct in certain circumstances. See generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988).

These numbers do not inform the judge about the particular history or character of the defendant. They do not explain the manner in which the crime was committed, nor whether there were aggravating or mitigating circumstances. They do not

consider or determine whether the defendant would benefit from alternatives to incarceration, how the defendant's dependents might be impacted by the sentence, or address the multitude of other personal considerations that should inform the final sentence. See, *e.g.*, *United States* v. *Diaz-Argueta*, 447 F.3d 1167, 1171 (9th Cir. 2006) ("[A] number taken from a table of the Sentencing Guidelines ... [does not] take[] into account all of the relevant circumstances that the statute states that the court 'shall consider.'"); see also *Johnson*, 467 F.3d at 563, 566; *Webb*, 403 F.3d at 383; *United States* v. *Cage*, 458 F.3d 537, 546 (6th Cir. 2006) (Clay, J., dissenting). Accordingly, reliance upon the Guidelines range as a substitute for the other factors specified in § 3553(a) cannot be squared with the statute's prescription that the sentencing judge consider (as the very first factor mandates) the "nature and circumstances of the case and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). In this regard, the statute mandates *individualized* sentencing and, as the remedial majority in *Booker* held, reduces the Guidelines' role to that of a resource to be consulted. 543 U.S. at 259-60.

Of course, district courts may no more ignore the Guidelines than rely on them exclusively. The sentencing range recommended by the Guidelines is one, but only one, of the factors that a district court must consider under § 3553(a). The range can be determined only through proper application of the Guidelines provisions, including potential departures. See *United States* v. *Fernandez*, 443 F.3d 19, 29 (2d Cir.) *cert. denied*, 127 S. Ct. 192 (2006); *United States* v. *Jackson*, 467 F.3d 834, 838-39 (3d Cir. 2006); *United States* v. *McBride*, 434 F.3d 470, 474-77 (6th Cir. 2006). A court that fails to conduct this analysis, or otherwise to consider the correct Guidelines range during sentencing proceedings, has

failed to comply with the statute. *E.g.*, *Fernandez*, 443 F.3d at 29; *Jackson*, 467 F.3d at 838-39.[5]

2. The second directive of § 3553(a) states that the final punishment must be "sufficient, but not greater than necessary," to satisfy the purposes set forth in paragraph (2). 18 U.S.C. § 3553(a). The language of command is, once again, straightforward: The penalty imposed "shall" be "sufficient" but no more than needed. *Id.* It must, as the statute instructs, be "not greater than necessary" to advance the statutorily approved purposes of sentencing. See *United States* v. *Ministro-Tapia*, No. 05-5101-CR, 2006 WL 3411410, at *3-5 (2d Cir. Nov. 28, 2006); *United States* v. *Foreman*, 436 F.3d 638, 643-44 & n.1 (6th Cir. 2006); *Jimenez-Beltre*, 440 F.3d at 521 (Torruella, J., concurring).

The purposes identified by Congress correspond to the traditional goals of sentencing: retribution, deterrence, incapacitation, and rehabilitation. See § 3553(a)(2); see also S. Rep. No. 98-225, at 75-76 (1983). The district court is obliged to determine, based on the facts of the particular case, the minimally adequate sentence that will advance these objectives. This is an inquiry that is peculiar to each case. Section 3553(a)(2) affords discretion to the district court to decide, based upon the facts in the record, which enumerated purpose (or purposes) best suits the case at hand and what sentence is minimally adequate to serve those purposes. See *Koon* v. *United States*, 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and

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[5] Most courts agree that departures remain an integral aspect of federal sentencing after *Booker*. *See, e.g.*, *United States* v. *Jackson*, 467 F.3d 834, 837-39 (3d Cir. 2006); *United States* v. *Wallace*, 461 F.3d 15, 32 (1st Cir. 2006); *United States* v. *McBride*, 434 F.3d 470, 474-77 (6th Cir. 2006). *But see United States* v. *Mohamed*, 459 F.3d 979, 985-87 (9th Cir. 2006) (stating that departures are not relevant under a sentencing regime where the Guidelines are advisory); *United States* v. *Arnaout*, 431 F.3d 994, 1003-04 (7th Cir. 2005) (same).

every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."); see also *Diaz-Argueta*, 447 F.3d at 1171; *Cage*, 458 F.3d at 546 (Clay, J., dissenting). The district court must be free to consider and weigh all relevant information to determine the appropriate punishment. Congress has so required. 18 U.S.C. § 3661.

Notably, adherence to the Guidelines range is not one of the enumerated purposes of sentencing under § 3553(a)(2). And for their part, the Guidelines themselves disavow any adherence to the enumerated purposes of punishment. See *Guidelines* § 1A1.1, at 3-4 (acknowledging that the Commission was unable to reconcile purposes of sentencing or apply them directly in crafting the Guidelines). The Guidelines range therefore may not be relied upon as an independent justification for the sentence. See *Johnson*, 467 F.3d at 563, 566; see also *Ministro-Tapia*, 2006 WL 3411410, at *3-5. Simply put, a sentence that is imposed for the purpose of complying with the Guidelines is unlawful under § 3553(a). See *Jimenez-Beltre*, 440 F.3d at 529-30 (Lipez, J., dissenting).

Presumptive reliance on the Guidelines range not only violates the plain language of the statute; it corrupts the process of independent inquiry and judgment contemplated by § 3553(a). The Guidelines are premised on policies, assumptions, and judgments that may be wholly inapplicable in a given case. Indeed, the Guidelines prohibit, discourage, or restrict the use of a wide range of factors in assessing whether a departure is appropriate – including those that are highly relevant here, military and civic service and employment history[6] – even though those matters clearly warrant considera-

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[6] The Guidelines prohibit consideration of, for example: socio-economic status, *Guidelines* § 5H1.10; substance or gambling addiction, *id.* § 5H1.4; disadvantaged upbringing, *id.* § 5H1.12; personal financial difficulties and economic pressures upon a trade or business, *id.* § 5K2.12; diminished capacity if the offense involved a threat of violence or was caused by the voluntary use of drugs or other intoxicants, *id.* § 5K2.13;

tion if a sentencing judge is faithfully seeking the minimum sentence necessary to satisfy the purposes identified in § 3553(a)(2). See *Booker*, 543 U.S. at 304-05 (Scalia, J., dissenting in part); see also *United States* v. *Smith*, 445 F.3d 1, 5 (1st Cir. 2006); cf. Br. of *Amicus Curiae* National Association of Criminal Defense Lawyers pt. II; Br. *Amici Curiae* of National Veterans Legal Services Program and Veterans for America. Most importantly, the Guidelines do not and cannot – indeed, were not intended by the Sentencing Commission to – reflect all of the statutory purposes of sentencing set forth in § 3553(a)(2). See Kenneth R. Feinberg, *The Federal Guidelines and the Underlying Purposes of Sentencing*, 3 Fed. Sent'g Rep. 326, 326-27 (1991). See generally Breyer, *supra*.

The paramount value underlying the Guidelines is one that does not even appear in § 3553(a)(2): the desire for sentencing uniformity. See Breyer, *supra*, at 4-5, 7, 13-14; see also U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987). There is no doubt that Congress desired greater uniformity when it passed the Sentencing Reform Act, and there is no doubt that the Guidelines were promulgated to further that aim. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 230-46 (1993).

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post-sentence rehabilitation, *id.* § 5K2.19; and the aberrant nature of the offense if the defendant had any "significant" prior criminal behavior or the offense involved drug trafficking subject to a mandatory minimum, *id.* § 5K2.20. They strictly discourage consideration of age, *id.* § 5H1.1; education and vocational skills, *id.* § 5H1.2; mental and emotional conditions, *id.* § 5H1.3; physical condition or appearance, *id.* § 5H1.4; employment history, *id.* § 5H1.5; family ties and responsibilities, *id.* § 5H1.6; military and civic service, *id.* § 5H1.11; and record of charitable conduct, *id.* They also impose detailed requirements for consideration of the victim's conduct, *id.* § 5K2.10; lesser harms, *id.* § 5K2.11; coercion and duress, *id.* § 5K2.12; diminished capacity, *id.* § 5K2.13; voluntary disclosure, *id.* § 5K2.16, and aberrant behavior, *id.* § 5K2.20.

But Congress did not include uniformity as a purpose worthy of consideration by the sentencing judge under § 3553(a)(2). Rather, it set forth the traditional goals of sentencing, all of which can be furthered in a particular case only by careful attention to the particular circumstances. See *Diaz-Argueta*, 447 F.3d at 1171. Any effort to achieve uniformity in sentencing as an independent purpose cannot, under the plain language of the statute, be elevated above the goals that Congress chose to privilege in § 3553(a)(2). Giving the Guidelines range presumptive weight does just that, and thus frustrates Congressional intent.

As noted above, § 3553(a) contemplates that the sentencing judge will consult the Guidelines. But the Guidelines, properly applied, serve only as a point of reference in determining the minimally adequate sentence that achieves the statutorily approved purposes. They are a possible starting point for sentencing. They may not, however, be both beginning and end.

B. The History And Judicial Treatment Of § 3553 Confirm That The Guidelines Should Be Viewed As Merely A Single Factor To Be Considered In Imposing The Sentence That Is "Sufficient But Not Greater Than Necessary" To Satisfy The Traditional Goals Of Sentencing.

The principle of "parsimony" is central to § 3553(a), and provides the guiding directive for sentencing. "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)." § 3553(a). This principle, often traced to the utilitarian school of thought and cited as an influence on the Framers, holds that punishment should be no harsher than necessary to advance legitimate governmental purposes, such as rehabilitation and deterrence. Norval Morris, *The Future of Imprisonment* 60-62 (1974). See generally Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 Am. J. Juris. 97 (1994). Under the parsimony principle, the only "just" sentence is one that is derived solely from necessity.

Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* bk. XIX, ch. 14, at 328 (Thomas Nugent trans., Batoche Books 2001) (1748) (characterizing all other punishment as "tyrannical").

This principle was incorporated into the Sentencing Reform Act. Feinberg, *supra*, at 326-27; see also S. Rep. No. 98-225, at 75-76. The provision that would become § 3553 was introduced in 1977. See generally Stith & Koh, *supra*. It mandated that the district court "shall impose" the sentence that is "sufficient but not greater than necessary" to satisfy the four traditional purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation. *Id.* at 271-72. Any other penalty would be unlawful.

District courts were directed under the original bill to "consider" several factors in determining the appropriate sentence. 123 Cong. Rec. 13,059, 13,067-68 (1977) (statement of Sen. Kennedy). One of these was the range recommended under the Guidelines. *Id.* The bill did not, however, mandate adherence to the Guidelines. *Id.* The sponsors recognized that, under this version of the legislation, the range recommended by the Guidelines would be merely one of several considerations relevant to sentencing. See Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 Am. Crim. L. Rev. 353, 373-74 (1979), *cited in* Stith & Koh, *supra*, at 244.

This understanding was changed by an amendment to the bill, introduced to limit the discretion of sentencing judges. 124 Cong. Rec. 209, 383 (1978) (statement of Sen. Kennedy). The new language, which would become subsection (b)(1) of § 3553, directed judges to "impose a sentence within the [Guidelines] range unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." *Id.* at 382-83. It was recognized that the amendment would, by mandating adherence to the recommended range, establish "the basic presumptive aspects

of the [G]uidelines." *Id.* at 383. The amendment was adopted by the Senate in 1978 and repeated in all subsequent versions of the bill, including the Sentencing Reform Act of 1984. Stith & Koh, *supra*, at 245-46.

District courts were thus faced with an internally inconsistent statute. They were directed under subsection (a) to determine and impose the minimally adequate sentence to satisfy the statutory purposes of sentencing. 18 U.S.C. § 3553(a) (2004). But, if the sentence required by subsection (a) fell outside of the Guidelines range, they were precluded from imposing it by subsection (b). *Id.* § 3553(b)(1). The only practical way to proceed in these circumstances, while giving some effect to both provisions, was to impose the sentence within the Guidelines range that fell closest to the "correct" sentence, as determined under subsection (a). See Stith & Koh, *supra*, at 246 (recognizing this "basic contradiction" in the bill). In other words, only by violating subsection (a) could courts comply with subsection (b).[7]

Booker eliminated the inconsistency by excising subsection (b)(1). 543 U.S. at 259. This Court, by removing that provi-

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[7] This problem was recognized as early as 1989, by the late Judge Edward R. Becker of the Third Circuit:

> Section 3553(a) requires – as a matter of law – that district courts impose a sentence sufficient, but not greater than necessary, to meet the four purposes of sentencing set forth in subsection 3553(a)(2) – retribution, deterrence, incapacitation, and rehabilitation. Imposition of a sentence greater than necessary to meet those purposes is therefore a violation of section 3553(a). The question then becomes whether a sentence imposed pursuant to applicable guidelines could ever be greater than necessary to meet the four statutory purposes. I believe that it could.

United States v. *Denardi*, 892 F.2d 269, 275-76 (3d Cir. 1989) (Becker, J., concurring in part and dissenting in part) (footnote omitted); *see also, e.g.*, *United States* v. *Deane*, 914 F.2d 11, 13 (1st Cir. 1990) (reversing sentence imposed in compliance with subsection (a) as a violation of subsection (b)); *United States* v. *Studley*, 907 F.2d 254, 257 (1st Cir. 1990) (same).

sion, rendered the Guidelines "advisory" and allowed the district courts to impose a sentence that fully honors the dictates of § 3553(a) by, when appropriate, going outside of the Guidelines range. *Id.* With the artificial constraint of the Guidelines now removed, judges may impose the sentence that, in their independent judgment, is minimally adequate to satisfy the purposes of sentencing. They may, in other words, comply fully with the directive of § 3553(a). There is no longer any basis in the language of the statute to give presumptive or controlling weight to the Guidelines.

C. The District Court's Imposition Of A Within-Guidelines Sentence Was Unreasonable In This Case Because It Did Not Reflect Consideration Of The § 3553(a) Factors To Serve The Statutory Purposes Of Sentencing.

Following restrictive circuit precedent, the district court below relied upon the suggested Guidelines range to the exclusion of many § 3553(a) factors. Foremost among the neglected factors were "the history and characteristics of the defendant." See § 3553(a)(1).

The record in this case was replete with information concerning Mr. Rita's "history and characteristics." Mr. Rita devoted more than 25 years to service in the military, during which he completed tours of duty in the Vietnam and Gulf Wars and received over 35 awards and medals.[8] He served as an investigator for the Immigration and Naturalization Service, where he assisted in criminal investigations and prosecutions, despite threats on his life. He suffers from a litany of serious physical ailments, some of which result from exposure to Agent Orange. He is 59 years old; he is a parent; and

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[8] The classification of military service as "not ordinarily relevant to determining whether a departure is appropriate" under the Guidelines, *see Guidelines* § 5H1.11, does not lessen or modify the court's obligation to take it into account under § 3553(a). *See supra* note 6 and accompanying text.

he continues to be a contributing and productive member of society.

All of these facts relate to the "history and characteristics of the defendant" and should have been assessed in crafting the final sentence. Yet, the district court made no mention of them in imposing the sentence of imprisonment. It did not address Mr. Rita's service to his country, his health problems, his family circumstances, or any other relevant personal considerations.[9] This renders the sentence unreasonable.

The district court also gave no consideration to "the kinds of sentences available." § 3553(a)(3). Many alternatives to imprisonment were available in this case, including probation, fines, intermittent confinement, community confinement, residential incarceration, home detention, intensive supervision, community service, or a combination of these. See, *e.g.*, 18 U.S.C. §§ 3561, 3563, 3571. These alternatives were particularly relevant here, given Mr. Rita's distinguished career in public service, his myriad health problems, and the risk that he would be victimized in prison. Yet, contrary to § 3553(a), the district court did not discuss on the record any kind of sentence other than one of imprisonment. This too renders the sentence unreasonable.

The district court's omissions, coupled with its exclusive reliance upon the Guidelines, necessarily violated the mandate of § 3553(a). Because the district court considered only one sentencing factor – the Guidelines range – and because that factor is concerned more with uniformity than the statutory purposes of punishment, it was impossible for the district court to impose a sentence "sufficient but not greater than necessary" to achieve the purposes of punishment. And so, the district court simply imposed the minimum sentence

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[9] That the district court failed to consider the impact of incarceration on Mr. Rita's health is even more troubling in light of subsequent comments, relating to the fine to be imposed, in which the court specifically – although superficially – refers to these issues. *See supra* note 4.

within the Guidelines range. As discussed above, that is *not* the same thing as imposing the minimum sentence necessary to satisfy the traditional goals of punishment.

The district court's comments at sentencing are most telling. It stated that "[t]he Court is unable to find that the sentencing guideline range ... is an inappropriate guideline range," and then proceeded to announce a sentence within that range. J.A. 87. There can be little doubt, based on these remarks, that the district court viewed – and was compelled by circuit precedent to view – the Guidelines range as presumptively correct, as a "super-factor" that could trump all other statutory considerations and purposes. Operating under this presumption effectively eliminated the district court's burden to determine an appropriate sentence, and thereby imposed upon the parties the obligation to justify a sentence outside of the recommended Guidelines range.

Such burden-shifting contravenes the statute. Because a sentence within the range recommended by the Guidelines does not necessarily advance the traditional purposes of punishment, the parties need not justify a non-Guidelines sentence. See, *e.g.*, *Diaz-Argueta*, 447 F.3d at 1171. As discussed above, nothing in the Guidelines or in § 3553 indicates that the Guidelines range reliably produces a sentence minimally adequate to satisfy the traditional purposes of punishment. The sentence imposed in this case was premised on a fundamental misunderstanding of § 3553(a), and it therefore must be reversed as unreasonable.

Had the district court been able to exercise its statutorily mandated discretion, it would more than likely have found that the relevant factors and purposes compelled a sentence below the recommended range. See § 3553(a)(2) (defining the approved purposes of sentencing). The myriad medical conditions from which Mr. Rita suffers, particularly those stemming from his combat service, can be treated more effectively outside of a prison environment, see § 3553(a)(2)(D) (statutory purpose "to provide the defendant with needed ...

medical care"), and, to the extent that those conditions reduce his life expectancy, clearly support a lesser sentence, see § 3553(a)(2)(A), (D) (statutory purpose "to provide just punishment"). Mr. Rita's age, history of employment, strong family ties, and other personal characteristics significantly decrease the risk of recidivism; in fact, statistical data produced by the Sentencing Commission demonstrate that an individual in Mr. Rita's position is generally *more* likely to recidivate if sentenced to a term of imprisonment, rather than probation.[10] See § 3553(a)(2)(B)-(D) (statutory purposes "to afford adequate deterrence," "to protect the public," and "to provide the defendant with ... correctional treatment in the most effective manner"). Moreover, his work as a criminal investigator renders Mr. Rita unusually susceptible to victimization in prison and may require extended periods of segregation, militating strongly against incarceration. Cf. *Koon*, 518 U.S. at 112 (recognizing that susceptibility to abuse in prison may serve as grounds for departure).

The district court's default to the Guidelines sentence in this case was particularly inappropriate because of the acknowledged *absence* of information concerning the unproven claim that Mr. Rita was an accessory to InterOrdnance's offense. The district court stated at sentencing that it could not assess the seriousness of Mr. Rita's offense or its impact on

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[10] U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 28-29 tbls. 9-10, 31 tbl. 12 (2004). Standards adopted by the United States Parole Commission classify Mr. Rita as having a salient factor score of 10 and as being among the least likely to recidivate. Further, the Parole Revocation Guidelines, as applied to Mr. Rita, recommend a discretionary sentence of less than ten months. *See* U.S. Parole Comm'n, *Rules and Procedures Manual* 28, 30, 38, 41, 58, 59-63 (2001); *see also* 28 C.F.R. § 2.20. These standards have been recognized by the Sentencing Commission as more adept at predicting recidivism than the criminal history calculation under the Guidelines. U.S. Sentencing Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 12 (2005).

the investigation into InterOrdnance. J.A. 86-87. Put simply, the district court acknowledged that it did not know whether the critical factor used to *double* Mr. Rita's sentence under the Guidelines was really all that important after all.[11] Yet it nonetheless adhered to the Guidelines in the face of that uncertainty, *and* in the face of all the additional facts concerning Mr. Rita that the Guidelines simply refuse to take into account, but which speak directly to the concerns identified by Congress in § 3553(a).

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[11] The lack of procedural protections accorded to Mr. Rita during sentencing is also troubling. The district judge found, simply as a matter of course and without any proof of the traditional elements of the offense, that Mr. Rita was an accessory after the fact. *See* 2 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* § 22.03 (5th ed. 2000). The government secured a conviction based on perjury but obtained a sentence based on a more serious, separate offense that it never had to prove. The Guidelines should not be treated as presumptively reasonable when they are so easily manipulated to evade constitutional protections. *See Washington* v. *Recuenco*, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting) ("[The defendant was] charged with one crime (assault with a deadly weapon), [but] convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments...."); *Booker*, 543 U.S. at 288 (Stevens, J., dissenting in part) (expressing concerns about "increasing a defendant's sentence on the basis of conduct not proved at trial"). To presume the Guidelines range is reasonable thus raises the very Sixth Amendment concerns that *Booker* was supposed to put to rest.

In addition, due process may be implicated when sentence-enhancing facts are not proved beyond a reasonable doubt. *Cf. County Court* v. *Allen*, 442 U.S. 140, 157 (1979); *Sandstrom* v. *Montana*, 442 U.S. 510, 524 (1979); *Francis* v. *Franklin*, 471 U.S. 307 (1985). Sentencing judges have recognized these constitutional concerns. *See, e.g., United States* v. *Pimental*, 367 F. Supp. 2d 143, 153-54 (D. Mass. 2005) (Gertner, J.); *see also United States* v. *Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1024-25, 1029 (D. Neb.), *aff'd*, 158 Fed. App'x 754 (8th Cir. 2005); *United States* v. *Coleman*, 370 F. Supp. 2d 661, 668-73 (S.D. Ohio 2005). Of course, whether or not a due process violation occurred, Mr. Rita's sentence was unreasonable under § 3553(a).

Properly considering all of the facts, there was no need for a custodial punishment. A term of probation, or other alternative to incarceration such as house arrest, would have amply satisfied the needs to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." § 3553(a)(2)(A). These alternatives would have fully served the purposes of deterrence in this case, as probation would have subjected Mr. Rita to conditions such as a prohibition on weapons and the possibility of being subjected to unannounced searches of his home or person. See *Samson* v. *California*, 126 S. Ct. 2193, 2202 (2006); *United States* v. *Knights*, 534 U.S. 112, 121-22 (2001).

An "unreasonable" choice of sentence, within the meaning contemplated in *Booker*, is one that reflects a misunderstanding of the relevant factors and purposes or fails to consider those matters in light of the record. 543 U.S. at 261. The sentence in this case was unreasonable for these reasons. It was imposed not as a result of the district court's assessment of the relevant factors and determination of the minimally adequate sentence, as required by § 3553(a), but as a direct consequence of the court's decision to accord controlling weight to the Guidelines range. This decision conflicts with the plain language of the statute, and renders the choice of sentence unreasonable.

II. COURTS OF APPEALS SHOULD NOT APPLY A PRESUMPTION OF REASONABLENESS FOR WITHIN-GUIDELINES SENTENCES.

A presumption of reasonableness for a within-Guidelines sentence, whether conclusive or rebuttable, is inconsistent with this Court's decision in *Booker* and with the plain language of § 3553(a). As demonstrated by this case, a within-Guidelines sentence provides no assurance that the district court honored its statutory obligation to "consider" all of the relevant factors and to impose a sentence "sufficient but not greater than necessary." If courts of appeals presume that Guidelines sentences are reasonable, particularly without

analysis or rationale, then there will be no mechanism to correct a district court's erroneous decision to do the same. District courts will thus effectively be encouraged to treat the Guidelines as presumptively appropriate, contrary to the statutory directive. Appellate rubber-stamping of within-Guidelines sentences was not endorsed in *Booker* and raises serious constitutional concerns. See 543 U.S. at 313 (Scalia, J., dissenting in part) (noting the risk that skewed review may "preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges").

A. Presuming Within-Guidelines Sentences To Be Reasonable Is Inconsistent With *Booker* And Raises Grave Constitutional Concerns.

This Court held in *Booker* that mandatory application of the Guidelines, in which the range of legally permissible sentences is increased based on findings by the district judge, violates the Sixth Amendment. 543 U.S. at 233. This Court cured the constitutional defect by excising 18 U.S.C. § 3553(b)(1), the provision of the Sentencing Reform Act that required imposition of a sentence within the range recommended by the Guidelines, and also 18 U.S.C. § 3742(e), the appellate review section under which the courts of appeals enforced conformity with the Guidelines. *Booker*, 543 U.S. at 260-61. The same standard of appellate review for all sentences now applies "across the board." *Id.* at 263. After *Booker*, "appellate courts [are] to determine whether the sentence 'is unreasonable' with regard to § 3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts ... in determining whether a sentence is unreasonable." *Id.* at 261. This return of sentencing discretion to the district courts, reinforced by even-handed appellate review of all sentences – within, above, or below the Guidelines range – preserves the constitutionality of the Guidelines sentencing regime.

Nothing in *Booker* suggests that within-Guidelines sentences should be afforded a presumption of reasonableness. The reasonableness standard for appellate review should apply even-handedly to the full range of sentences – both within-Guidelines and without. See *id.* at 263 ("[A]ppellate judges will prove capable ... of applying [the reasonableness] standard across the board."). Given the remedial majority's careful and unambiguous holding on this point, and the dissenters' emphasis that appellate review for reasonableness be applied uniformly to sentences across the board,[12] *Booker* makes clear that careful and even-handed appellate review is necessary to avoid the knife-edge of constitutional concern. Thus, there is absolutely no basis in *Booker* for the proposition that parties seeking to challenge a within-Guidelines sentence must bear an additional burden of overcoming a presumption in favor of the Guidelines. To favor within-Guidelines sentences by presuming them to be reasonable is to transform a sentencing system meant to be "effectively advisory" into one that is "effectively mandatory."

1. A Presumption Of Reasonableness Is Irreconcilable With *Booker*.

Reasonableness review is not a mystery: it was defined in *Booker*, and specific examples were provided. It requires appellate courts to ensure that all sentences, including those within the range recommended by the Guidelines, are reasonable in light of *all* the sentencing factors specified in § 3553(a). "[I]n determining whether a sentence is unreasonable," appellate courts should be guided, "as they have in the past," by the "numerous factors" set forth in § 3553(a). *Booker*, 543 U.S. at 261.

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[12] *See Booker*, 543 U.S. at 311-12 (Scalia, J., dissenting in part) (noting the importance for courts of appeals to "evaluate each sentence individually for reasonableness, rather than apply the cookie-cutter standards of the mandatory Guidelines" in order to distinguish from the "mandatory Guidelines system that the Court today holds unconstitutional").

The examples cited in *Booker* for reasonableness review, involving appeals from sentences imposed after revocation of release under the advisory policies of Chapter Seven of the Guidelines, are illustrative.[13] These cases do not afford special deference or a presumption of reasonableness to sentences imposed within the recommended range, see *United States* v. *White Face*, 383 F.3d 733, 739 (8th Cir. 2004); see also *United States* v. *Tsosie*, 376 F.3d 1210, 1218 (10th Cir. 2004), *cert. denied*, 543 U.S. 1155 (2005); nor do they require exceptional reasons to justify variances from that range, see *United States* v. *Hurst*, 78 F.3d 482 (10th Cir. 1996); see also *United States* v. *Kelley*, 359 F.3d 1302, 1304-05 (10th Cir. 2004); *United States* v. *Cook*, 291 F.3d 1297, 1302 (11th Cir. 2002); *United States* v. *Wall*, No. 99-1626, 2000 WL 280322, at *3 (2d. Cir. Mar. 14, 2000); *United States* v. *Marvin*, 135 F.3d 1129, 1136 (7th Cir. 1998). Rather, they recognize that the advisory range, while entitled to due consideration, should "inform[] rather than cabin[] the exercise of the judge's discretion." *United States* v. *Salinas*, 365 F.3d 582, 588-90 (7th Cir. 2004). Just as reasonableness review in the revocation context is not tethered to the advisory range, so must reasonableness review post-*Booker* remain unchained to the Guidelines.

Several courts of appeals have nonetheless concluded that a sentence within the advisory Guidelines range is presumptively reasonable because the Guidelines represent the Sentencing Commission's expert "integration" of the other factors of § 3553(a). See *Jimenez-Beltre*, 440 F.3d at 522-23 (Howard, J., concurring in the judgment); *United States* v.

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[13] *See Booker*, 543 U.S. at 262 (citing *United States* v. *White Face*, 383 F.3d 733, 737-40 (8th Cir. 2004); *United States* v. *Tsosie*, 376 F.3d 1210, 1218-19 (10th Cir. 2004), *cert. denied*, 543 U.S. 1155 (2005); *United States* v. *Salinas*, 365 F.3d 582, 588-90 (7th Cir. 2004); *United States* v. *Cook*, 291 F.3d 1297, 1300-02 (11th Cir. 2002); *United States* v. *Olabanji*, 268 F.3d 636, 637-39 (9th Cir. 2001); *United States* v. *Ramirez-Rivera*, 241 F.3d 37, 40-41 (1st Cir. 2001)).

Johnson, 445 F.3d 339, 343-44 (4th Cir. 2006); *United States* v. *Buchanan*, 449 F.3d 731, 735-36 (6th Cir. 2006) (Sutton, J., concurring); *United States* v. *Mares*, 402 F.3d 511, 519 (5th Cir.), *cert. denied*, 126 S. Ct. 43 (2005). However, the Guidelines are an inadequate proxy for the remaining factors. The structure of the statute makes clear, by explicitly listing other factors, that the Guidelines alone are not sufficient. Moreover, as discussed above, the Guidelines do not integrate the purposes of sentencing set forth in § 3553(a), do not incorporate the parsimony provision, and do not include – and in many instances actually exclude – factors that the statute requires the sentencing court to consider. See *supra* note 6 and accompanying text. The Guidelines are generalizations that may or may not be reasonable in a particular case. See *Jimenez-Beltre*, 440 F.3d at 518 ("[T]he guidelines are still generalizations that can point to outcomes that may appear unreasonable to sentencing judges in particular cases.") (emphasis omitted); *id.* at 527 (Lipez, J., dissenting) ("[T]he guidelines are inescapably generalizations [and, as such,] ... are in tension with the holistic, personalized view of the defendant required by section 3553(a)'s other factors."). Courts cannot simply assume that the Guidelines range accurately balances the purposes of the statute with respect to any individual offender or offense. That is not what the Guidelines were designed to do. They were created to amalgamate the results for a broad range of defendants whose individual circumstances will vary considerably.[14]

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[14] As one judge has thoughtfully observed:

> I ... credit the Guidelines with producing a sentence which would be reasonable upon appeal given an 'average' defendant with the background and offense circumstances in an average defendant's position. Yet, an 'average' defendant is a mathematical amalgamation which does not exist in real life, and a 'presumption' of reasonableness in the trial court or on appeal leads courts to overly rely on the rather broad generalizations inherent in the Guidelines. In sentencing, the district court is not tasked with fashioning a sentence for an average

Nor can a presumption of reasonableness be justified on the ground that a Guidelines sentence represents "the alignment of the views of the Sentencing Commission with the independent views of a sentencing judge." *Buchanan*, 449 F.3d at 736 (Sutton, J., concurring). Such an argument entirely begs the question of whether the district court's within-Guidelines sentence was reasonable in light of the other factors and the enumerated purposes of punishment specified in § 3553(a). The alignment argument produces only one result – affirmance – and such a tautological test is entirely inconsistent with the "across the board" reasonableness review contemplated by this Court in *Booker*.

2. A Presumption Of Reasonableness Raises Serious Constitutional Concerns.

A presumption that discourages courts from considering more information about the particular individual before the court "would come parlously close to reinstituting the very rigid restraints on sentencing that caused the unpruned sentencing statute to be unconstitutional in the first place." *United States* v. *Zavala*, 443 F.3d 1165, 1170 (9th Cir.), *reh'g en banc granted*, 462 F.3d 1066 (9th Cir. 2006); see also *Jimenez-Beltre*, 440 F.3d at 528 n.11 (Lipez, J., dissenting) ("[I]t would be foolhardy to ignore the constitutional dangers of adopting an approach to the guidelines post-*Booker* that approximates, in a new guise, the mandatory guidelines."). It raises serious constitutional concerns to recreate, through use of a presumption that privileges within-Guidelines sentences, the same system that was held to be unconstitutional in *Booker*. The excision of subsection (b)(1) of § 3553 salvaged the federal sentencing structure only because it restored to district courts the discretion to impose sentences outside of the range recommended by the Guidelines. *Booker*, 543 U.S.

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defendant; the court must determine an appropriate sentence for the individual defendant before it.

Cage, 458 F.3d at 546 (Clay, J., dissenting) (emphasis omitted); *see also Koon*, 518 U.S. at 113.

at 260-61. Any approach that would limit that discretion once more, rendering the range of permissible sentences again dependent on findings under the Guidelines, exposes the federal regime to the same constitutional infirmities recognized in *Booker*. See *id.* A presumption of reasonableness for within-Guidelines sentences has just this effect.

As has been noted by many commentators, and confirmed by data from the Sentencing Commission, "[a] culture of guideline compliance has persisted after *Booker*."[15] In the post-*Booker* world, the great majority of sentences imposed by district courts still conform with the Guidelines.[16] Many district courts, as in this case, have continued to rely almost exclusively on the Guidelines as the starting and ending point of their sentencing process. See, *e.g.*, *United States* v. *Wilson*, 350 F. Supp. 2d 910, 925 (D. Utah 2005); *United States* v. *Wanning*, 354 F. Supp. 2d 1056, 1058 (D. Neb. 2005); *United States* v. *Clay*, No. 2:03-CR-73, 2005 WL 1076243, at *1 (E.D. Tenn. May 6, 2005); *United States* v. *Peach*, 356 F. Supp. 2d 1018, 1021-23 (D.N.D. 2005).

Several district courts, however, have properly recognized that *Booker* was "not ... an invitation to do business as usual." *United States* v. *Ranum*, 353 F. Supp. 2d 984, 986-87

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[15] Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 Hous. L. Rev. 341, 349 (2006).

[16] According to the Commission's report examining the impact of *Booker* on federal sentencing, some 62.2% of post-*Booker* sentences fell within the Guidelines range. When within-range and government-sponsored below-range sentences are combined, the rate of conformance with the sentencing guidelines is 85.9%. U.S. Sentencing Comm'n, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* 57, 62 tbl. 1 (2006) ("*Final Report*"); *see also* U.S. Sentencing Comm'n, *Preliminary Quarterly Data Report: 4th Quarter Release* 1 tbl.1 (2006) (reflecting similar statistics based on preliminary data through September 2006). *See generally* Frank O. Bowman, III, *The Year of Jubilee ... or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After* Booker, 43 Hous. L. Rev. 279 (2006).

(E.D. Wis. 2005). Far from engaging in "unmoored decision making," these courts have dutifully consulted the Guidelines, within the framework dictated by § 3553, in order to undertake "the type of careful analysis of the evidence that should be considered when depriving a person of his or her liberty." *United States* v. *Myers*, 353 F. Supp. 2d 1026, 1028-29 (S.D. Iowa 2005) (emphasis omitted); see also *United States* v. *Jaber*, 362 F. Supp. 2d 365, 370-71 (D. Mass. 2005) (recognizing that the Guidelines "cannot be outcome-determinative without running afoul of *Booker*"). These courts acknowledge that "under *Booker* ... the court may not calculate the applicable guideline range and then stop thinking, treating the guideline calculation as definitive." *United States* v. *McQueen*, No. IP05-10-CR-H/F, 2006 WL 3206150, at *5 (S.D. Ind. Apr. 20, 2006).

Unfortunately, although such reasoned application of the Guidelines in light of the statutory requirements is required under *Booker*, appellate standards that privilege within-Guidelines sentences will undermine the good faith efforts of district courts to comply with their obligations. A judge once, or twice, reversed for sentencing outside the Guidelines, who also notices the consistent affirmance of within-Guidelines sentences, will reasonably conclude that the "law," broadly understood to include not only § 3553(a), but also appellate decisions, all but requires him or her to impose a sentence within the Guidelines.[17]

Appellate reversals of within-Guidelines sentences are almost impossible to find. Of the 1,152 appeals of within-Guidelines sentences reviewed by Amicus Curiae New York

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[17] As one district judge in the Fourth Circuit has recently observed: "Whether you call it an appellate standard or my standard or anything else, if it's [a sentence] which doesn't fit their standard as they explain it in their opinions, then it's unlawful and I shouldn't impose it." Transcript of Sentencing Hearing at 29, *United States* v. *Raby*, No. 2:06-00017-CR (S.D.W.V. Sept. 27, 2006), *available at* www.fd.org/RabyTranscript9.27.06.pdf.

Council of Defense Lawyers, nearly 99% were affirmed. App. to Br. of Amicus Curiae New York Council of Defense Lawyers at 5 ("NYCDL App."). In only 16 of these cases did the court of appeals vacate a within-Guidelines sentence, and in only one of those did the court do so because it found the sentence to be substantively unreasonable. *Id.*

Appellate reversals of *non*-Guidelines sentences, particularly those challenged by the prosecution as below the recommended range, are much more prevalent. Of the 71 below-Guidelines sentences appealed by the government, the government prevailed in vacating the sentence 85% of the time. *Id.* at 6. In the remaining 292 cases, above-Guidelines sentences were affirmed at a rate of 95%, and below-Guidelines sentences were – when challenged by the defendant as nonetheless too severe – affirmed an astonishing 100% of the time. *Id.* at 6-7. Overall, a within-Guidelines sentence is thirteen times more likely to be affirmed on appeal than one that is outside the recommended range.[18] See *id.* at 3; see also *Final Report*, *supra*, at 30 ex. 2 (reporting similar findings).

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[18] This is not, of course, to suggest that all reversals of non-Guidelines sentences have been inappropriate. Several of these have been based on potentially valid rationales, including the district court's failure to explain the final sentence by reference to the purposes of § 3553(a), *see, e.g.*, *United States* v. *Feemster*, 435 F.3d 881, 884 (8th Cir. 2006) ("[I]n the wake of *Booker*, a court maintains a duty to explain its reasons for the sentence imposed with some degree of specificity."), or its misapplication of relevant factors, *see, e.g.*, *Wallace*, 458 F.3d at 32-33 (stating that mere generalized disagreement with the Guidelines is not a permissible justification for a sentence in a particular case). But the sheer number of non-Guidelines reversals suggests that these justifications simply serve as a means to reconstruct the mandatory regime rejected by this Court in *Booker*. Prosecution sentencing practices actively promote this recreation of a mandatory regime. *See* Mem. from James B. Comey, Deputy Attorney General, U.S. Dep't of Justice, to All Federal Prosecutors, re: Department Policies and Procedures Concerning Sentencing 1-2 (Jan. 28, 2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf (exhorting prosecutors to "take all steps necessary to ensure adherence to the Sentencing

The results are even more striking when the sample is limited to circuits applying a presumption of reasonableness. Appellate courts in those circuits are more likely to affirm a within- or above-Guidelines sentence and to reverse a below-Guidelines sentence. NYCDL App. 3-4.[19] The Fourth Circuit has, in fact, *never* reversed a within-Guidelines sentence (despite 201 opportunities) and has reversed *all* below-Guidelines sentences appealed by the prosecution. *Id.* at 3. District courts in these circuits have received the message: they impose below-Guidelines sentences in one-third fewer cases than courts in other circuits.[20] Moreover, whether or not a given circuit formally applies a presumption of reasonableness, all courts of appeals are routinely tethering reasonableness review in some way to the Guidelines, thereby modifying district court practice.[21]

Guidelines," and to "actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases").

[19] The judicial presumption of reasonableness, when applied with this bias in favor of above-Guidelines sentences, is in direct tension with the principle of parsimony embodied in § 3553(a) and takes on the character of the "minimum [G]uideline[s] system" recently proposed by Attorney General Alberto Gonzales as a *legislative* response to *Booker*. *See* Attorney General Alberto Gonzales, Sentencing Guidelines Speech (June 21, 2005), *in* 17 Fed. Sent'g Rep. 324, 326 (2005). Under this approach, the district court "would be bound by the [G]uidelines minimum" while the "[t]he guidelines *maximum* . . . would remain advisory." *Id.*

[20] *See* Fed. Pub. & Cmty. Defenders, *Difference in Rates of Below-Guideline Sentences Imposed in Presumptive and Non-Presumptive Circuits* 1 (2006), *available at* http://www.fd.org/DifferenceinRatesofBelow-GuidelineSentencesImposed1.12.05-11.27.06.pdf

[21] *See United States* v. *Moreland*, 437 F.3d 424, 432 (4th Cir.), *cert. denied*, 126 S. Ct. 2054 (2006) ("The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be."); *see also United States* v. *Davis*, 458 F.3d 491, 496-97 (6th Cir. 2006) (same); *United States* v. *Medearis*, 451 F.3d 918, 920 (8th Cir. 2006) (same); *Cage*, 451 F.3d at 594 (same); *United States* v. *Ture*, 450 F.3d 352, 357 (8th Cir. 2006) (same); *United States* v. *Hampton*, 441 F.3d 284, 288 (4th Cir. 2006) (same); *United States* v. *Claiborne*, 439

Presuming a within-Guidelines sentence to be reasonable (or presuming that the further a sentence is from the Guidelines range, the less likely it is to be reasonable) places an additional burden on the district court to justify non-Guidelines sentences.[22] It requires not only an articulation of the factors and purposes considered and how those factors affected the sentence to be imposed, but also an additional explanation not called for by the statute as to why those factors are sufficient to overcome a presumption of indeterminate strength that will be applied on appeal. And, in affirming within-Guidelines sentences on the basis that there is not sufficient evidence to disprove them, courts of appeals fall victim to the classic logical fallacy of an "appeal to ignorance," or the *argumentum ad ignorantiam*: proposition A is not proved to be false; therefore A is true. See Douglas Walton, *The Appeal to Ignorance, or* Argumentum Ad Ignorantiam, 13 Argumentation 367 (1999). Presuming a Guidelines sentence to be reasonable absent proof to the contrary unduly burdens appellants

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F.3d 479, 481 (8th Cir.) (same), *cert. granted*, 127 S. Ct. 551 (2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005) (same).

[22] Moreover, to the extent that a district court internalizes the presumption of reasonableness, it treats the Guidelines sentence as "more than a mere starting point because it gives particular weight to the thing presumed. It would indicate that the Guideline range *is* to be used unless (by some evidentiary standard) a party can prove the contrary. That is much more than a mere consult for advice, and [under *Booker*] the Guidelines are to be no more than that." *Zavala*, 443 F.3d at 1169 (citation omitted). It has also been observed that the use of the Guidelines range as an analytic starting point (permitted but not required under *Booker*) itself privileges the Guidelines through the effects of psychological anchoring, as "judgments tend to be strongly biased" in the direction of the initial anchor where "numeric judgments are assimilated to a previously considered standard," and the "300-odd page Guideline Manual provides ready-made anchors." Nancy Gertner, *What Yogi Berra Teaches About Post*-Booker *Sentencing*, 115 Yale L.J. Pocket Part 137, 138 (2006), *available at* http://www.thepocketpart.org/2006/07/gertner.html (citing Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. Applied Soc. Psychol. 1535, 1536 (2001)).

with the nearly impossible task of proving a negative. As stated in one of the few (if not the only) published decision where a within-Guidelines sentence has been reversed for substantive unreasonableness, "only highly unusual circumstances will cause this court to conclude that the presumption has been rebutted." *United States* v. *Lazenby*, 439 F.3d 928, 933 (8th Cir. 2006). This high burden is placed on appellants – typically defendants – even though, as discussed above, there is no basis in the statute to presume that the Guidelines range will provide the appropriate sentence. The effect of a presumption of reasonableness is thus to allow the courts of appeals to "seek refuge in the familiar and continue (as the remedial majority invites, though the merits majority forbids) the 'appellate sentencing practice during the last two decades,'" of applying greater judicial scrutiny to non-Guidelines sentences. *Booker*, 543 U.S. at 312 (Scalia, J. dissenting in part).

Moreover, with such a presumption in place, one can hardly be confident that a district court's decision to impose a sentence within the Guidelines range represents its "independent view," as opposed to its desire to take advantage of the safe harbor created by the presumption. A presumption of reasonableness on "appellate review may coerce virtual Guidelines compliance in the ordinary run of cases [and] ... surely makes Guidelines compliance the path of least resistance." Michael W. McConnell, *The* Booker *Mess*, 83 Denv. U. L. Rev. 665, 682 (2006); see also *Buchanan*, 449 F.3d at 740 (Sutton, J., concurring) ("If I have one anxiety about the presumption, it is the risk that it will cast a discouraging shadow on trial judges who otherwise would grant variances in exercising their independent judgment."); *Cage*, 458 F.3d at 545-46 (Clay, J., dissenting) ("[A] presumption of reasonableness on appeal unduly pressures the district court to sentence within the Guidelines range in order to discourage review and avoid reversal."). To the extent that a district court treats the Guide-

lines as anything more than advisory, the Sixth Amendment is violated.

B. A Presumption Of Reasonableness For Within-Guidelines Sentences Cannot Be Justified On Policy Grounds.

The "effectively mandatory" sentencing regime created by a presumption of reasonableness not only contravenes § 3553(a) and the Sixth Amendment, but also disserves the policy goals of the Sentencing Reform Act. A presumption of reasonableness serves only to foster uniformity by mechanical fiat. And it does not further the reduction of unwarranted disparities in sentencing because the Guidelines themselves, if mechanically applied, foster such disparities. Moreover, by relaxing judicial scrutiny of within-Guidelines sentences, a presumption of reasonableness destroys the potential that an advisory sentencing system affords for federal judges to become active participants in the ongoing dialogue of shaping federal sentencing law and assisting in needed revision of the Guidelines.

1. A Presumption Of Reasonableness Will Not Promote Desired Uniformity In Sentencing Because Of The Recognized Flaws In The Design Of The Guidelines.

The courts of appeals that impose a presumption of reasonableness often contend that the presumption is necessary to preserve the uniformity in sentencing that Congress sought to achieve in enacting the Sentencing Reform Act. See, *e.g.*, *Jimenez-Beltre*, 440 F.3d at 522-23 (Howard, J., concurring in the judgment) ("[The Guidelines] are the only conceivable centers of gravity around which some semblance of uniformity in federal sentencing might be maintained ...."). This argument is unconvincing.

As an initial matter, the mandatory Guidelines regime fostered both unwarranted disparity and excessive uniformity. These design flaws in the Guidelines have been long-

recognized.[23] The Sentencing Commission itself concedes that it has "only partially achieved" the goal of avoiding unwarranted disparities while maintaining sufficient flexibility to permit warranted differences. U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 142-43 (2004) ("*Fifteen Year Report*"); S. Rep. No. 95-605, at 1161 (1977) ("[T]he key word in discussing unwarranted sentence disparities is 'unwarranted.'"). To help eliminate unwarranted disparities inherent in the design of the Guidelines, federal judges were given the job of tailoring individual sentences as necessary to serve the purposes set forth in the Sentencing Reform Act, with some discretion to take account of factors not adequately considered in the Guidelines. Importantly, Congress said that "the judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender," and that "[t]his will assure that the ... sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature." S. Rep. No. 98-225, at 52-53. However, the Guidelines, without more, preclude comprehensive examination of the particular offense and the offender. See *supra* pp. 10-11.

Unwarranted disparity is built into the Guidelines in other ways. For example, regional disparity persists under the Guidelines and has even increased for some offenses. *Fifteen Year Report*, *supra*, at 94, 98, 140. In addition, as the Sentencing Commission acknowledges, "[t]oday's sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by

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[23] As observed *supra* p. 13, the goal of reducing unwarranted disparities in sentencing is omitted from the purposes of individualized sentencing set forth in § 3553(a)(2). It is nonetheless not disputed that Congress sought to reduce sentencing disparity overall with passage of the Sentencing Reform Act.

judges in the discretionary system in place immediately prior to guidelines implementation." *Id.* at 135. Rules identified by the Commission that create disparity but are not a "necessary and effective means to achieve the purposes of sentencing" include the drug trafficking guidelines, the relevant conduct rules, the career offender guideline, and the inclusion of non-moving traffic violations and other minor offenses in the criminal history score. *Id.* at 47-55, 76, 113-14, 131-34, 141.[24]

Furthermore, even accepting that the Guidelines, albeit imperfect, are nonetheless the congressionally endorsed federal standards, and therefore the only conceivable "center of gravity" around which uniformity can be maintained, a presumption of reasonableness is not necessary for the Guidelines to serve their purpose of promoting enhanced uniformity. District courts must consider the Guidelines range in their sentencing calculus under § 3553(a)(4). The fact that most courts will use them as a starting point will surely produce an gravitational effect on sentences. But the Guidelines should be accorded no greater force than that which they merit by virtue of being considered as one factor in a multi-factor statutory scheme, in light of both the statute and grave constitutional concerns. *Booker*, 543 U.S. at 260.

Of course, to the extent that the Guidelines were deemed to foster uniformity, such uniformity could be advanced by holding that all sentences outside the Guidelines range are unreasonable. But such a rule would surely run afoul of the Court's holding in *Booker* by effectively eliminating the district courts' sentencing discretion. See 543 U.S. at 311 (Scalia, J., dissenting in part) ("[A]ny system which held it

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[24] *See also* Briton K. Nelson, *Adding Fuel to the Fire:* United States v. Booker *and the Crack Versus Powder Cocaine Sentencing Disparity*, 40 U. Rich. L. Rev. 1161, 1191 (2006); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85, 117 (2005). *See generally* Erik Luna, *Grid Land: An Allegorical Critique of Criminal Sentencing*, 96 J. Crim. L. & Criminology 25 (2005).

per se unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional."); see also *Moreland*, 437 F.3d at 433-34; *United States* v. *Reinhart*, 442 F.3d 857, 864 (5th Cir.), *cert. denied*, 127 S. Ct. 131 (2006); cf. *Booker*, 543 U.S. at 263 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure."). As long as district judges have discretion to impose a non-Guidelines sentence when they conclude that the totality of the § 3553(a) factors requires such a sentence, they will (and should) exercise that discretion. If the presumption of reasonableness leads district courts to impose within-Guidelines sentences in cases where they would otherwise impose non-Guidelines sentences, then that is simply evidence that the presumption is operating to cabin unlawfully the district court's exercise of discretion.[25]

2. A Presumption Of Reasonableness Will Stifle Judicial Feedback Needed To Improve The Guidelines.

In passing the Sentencing Reform Act, Congress envisioned a fully "interactive guidelines process" wherein the combined efforts of the Sentencing Commission and federal judges would foster the development of federal sentencing law. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1694 (1992). The Act instructs the Commission to "establish sentencing policies and practices for the Federal criminal justice system that assure ... the

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[25] Moreover, to the extent that courts of appeals rely on the allegedly discretionary nature of the Guidelines to justify diminished procedural protections, yet at the same time cabin the exercise of the district court's discretion through a presumption of reasonableness, fundamental questions of fairness are implicated and the promises of "certainty and fairness in ... sentencing" contained in 28 U.S.C. § 991(b)(1)(B) are undermined. *See also supra* note 11.

meeting of the purposes of sentencing as set forth in [the Act]" and to monitor the sentencing system's effectiveness in meeting the purposes of criminal sentencing set forth in § 3553(a)(2). 28 U.S.C. § 991(b). Crucially, in this "judge-based sentencing system that Congress enacted into law," *Booker*, 543 U.S. at 265, it is judges – not the Commission – who are charged with evaluating the adequacy of the Guidelines in each case to ensure compliance with the purposes of criminal sentencing set forth in § 3553(a)(2). The Senate Report highlighted the need for judges to detail sentencing justifications, so as to "assist[] the Sentencing Commission in its continuous reexamination of its guidelines and policy statements." S. Rep. No. 98-225, at 80.

As noted in *Booker*, the "Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." 543 U.S. at 264 (citing 28 U.S.C. § 994). "The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices." *Id.* at 263. Only if the substantive content of reasonableness review is untethered to the Guidelines will the Commission be assured of the thorough assessments by the federal courts needed to "move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264-65. The Commission can evaluate whether the Guidelines are effective in serving the purposes of sentencing only if district courts are free to sentence outside of the Guidelines when necessary to appropriately individualize sentences, and appellate courts analyze the merits of those judgments in relation to the purposes of sentencing, and not in relation to the Guidelines themselves.

Design flaws in the Guidelines have been recognized by judges since their inception. Such feedback from judges was strongly desired, and was expected to improve the Guidelines. Although there were complaints that the original guidelines were "too harsh," the system was meant to be "evolutionary" and was to be improved based on information from actual practice under the Guidelines. Breyer, *supra*, at 18-20, 23; see also *U.S. Sentencing Guidelines Manual* ch. 1, pt. A., at 1.2 (1991). For example, mitigating factors such as age, employment history, and family ties were not included because the Commissioners could not agree, but this was intended to evolve based on experience. See Breyer, *supra*, at 19-20. From the outset, it was recognized that the Guidelines were based on "false" precision and could be improved in their application through the exercise of "greater judicial discretion" to provide "fairness and equity in the individual case." Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 186 (1999) ("*Guidelines Revisited*").

However, under the pre-*Booker* mandatory sentencing regime, federal judges were unable to contribute to the development of federal sentencing law. As recognized in *Booker*, departures under the Guidelines were "not available in every case, and in fact [were] unavailable in most." 543 U.S. at 234. This was not only because the recognized grounds for departures were limited, but because the Commission actively discouraged Guidelines departures. See *Guidelines* § 1A1.1, at 5 ("[T]he Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often."); see also *id.* § 5K2.0 cmt. 3(A)(ii), (B)(i) ("[I]t is expected that [most] departures ... will occur rarely and only in exceptional cases."); *id.* § 5K2.0 cmt. background ("[C]ircumstances warranting departure should be rare."). This stance, taken together with the Commission's initial formulation of complex, rigid, and purportedly complete guidelines, and the additional overlay of mandatory minimum sentences legislated by Congress, all limited the extent to

which the federal judiciary could fulfill their expected role of helping to shape federal sentencing law. See generally Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol'y Rev. 93 (1999).

As a result, the Guidelines have developed largely in response to political concerns driven by Congress and the Executive Branch. See Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan. L. Rev. 235, 250-56 (2005). Far from evolving based on the daily experiences of judges engaged in sentencing in service of the parsimony provision, the Guidelines have "move[d] only one way: slowly, steadily, pawl by pawl, upward." *Id.* at 256.[26]

After *Booker*, sentencing judges are free to impose sentences outside of the Guidelines system if merited by the § 3553(a) purposes. This does not mean that federal judges may (or should) disregard the Guidelines, but it does mean that sentencing judges may now, when justified by individual circumstances, impose sentences in ways that correct for well-recognized flaws in the Guidelines. Through its data collection and analysis of sentencing decisions, the Commission can then fulfill its mandate to draw upon the collective expertise of Article III judges in the service of revising and improving the Guidelines. Such a meta-dialogue between the courts and the Commission is the congressionally envisioned and optimal means of achieving uniformity: that is, through consensus rather than the unsupported imposition of a legal presumption.

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[26] The number of federal prisoners has more than doubled in the past decade, increasing from 89,538 in 1995 to 179,200 in 2005. On December 31, 2005, 1 in every 136 United States residents was in prison or jail. U.S. Dep't of Justice, Bureau of Justice Statistics, *Bulletin: Prisoners in 2005*, at 1-2 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf.

But sentencing data will be relevant and useful for revision of the Guidelines only if the touchstone of reasonableness review by the appellate courts is something other than the Guidelines themselves. Put otherwise, if federal judges impose and uphold sentences because they are consistent with the Guidelines – rather than exercise their statutory duty to determine whether a given sentence (including a within-Guidelines sentence) complies with the purposes of sentencing set forth in § 3553(a)(2) – the Commission will be deprived of precisely the sort of information it most needs to refine the Guidelines. Only even-handed "across the board" application of the same quality of judicial attention to the full range of sentences will serve to "continue to move sentencing in Congress' preferred direction." *Booker*, 543 U.S. at 264-65.[27]

III. A WITHIN-GUIDELINES SENTENCE CANNOT BE DEEMED REASONABLE, WHETHER OR NOT A PRESUMPTION OF REASONABLENESS IS ACCORDED, WHEN THE DISTRICT COURT DOES NOT ADEQUATELY EXPLAIN ITS CONSIDERATION OF THE FACTORS AND PURPOSES OF § 3553(a).

That district courts have greater discretion in sentencing post-*Booker* does not negate their statutory duty to articulate their reasoning on the record. To the contrary, this increased discretion heightens both the need for and the value of a reasoned explanation for the sentence imposed, whether it falls within or without the Guidelines range. This Court has made clear, when reviewing language similar to that of § 3553(a), that district courts must articulate their consideration of all

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[27] *See also* The Constitution Project, *Principles for the Design and Reform of Sentencing* 12 (2006), *at* http://www.constitutionproject.org/Sentencing_Principles_Background_Report.pdf ("[E]ffective sentencing guidelines with meaningful appellate review are a critical component of a successful sentencing system.").

factors relevant to judgment. See *United States* v. *Taylor*, 487 U.S. 326, 336 (1988). A sentence imposed without an adequate explanation, whether or not within the range recommended by the Guidelines and whether or not accorded a presumption of reasonableness, cannot be deemed reasonable on appeal.

A. The Sentencing Reform Act Mandates That District Courts Provide A Reasoned Explanation For All Sentences Imposed Based On The Factors And Purposes Of § 3553(a).

The language of the Sentencing Reform Act plainly requires that district courts offer a statement of reasons for all sentences. Section 3553(c) provides, in pertinent part, as follows:

> The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence ....

§ 3553(c). This provision clearly instructs that the district court must articulate the basis for the sentence imposed in every case. *Id.*; see also *United States* v. *Sanchez-Juarez*, 446 F.3d 1109, 1114-17 (10th Cir. 2006); *United States* v. *Molina*, 356 F.3d 269, 276-77 (2d Cir. 2004).

The explanation must proceed by reference to the factors and purposes of § 3553(a), as that section mandates that the district court "shall consider" the relevant factors in rendering judgment and "shall impose" the sentence that is "sufficient but not greater than necessary" to comply with the relevant purposes. § 3553(a). The only appropriate sentence is one that adheres to these statutory requirements; therefore, the only appropriate explanation for a sentence is one that relates to these considerations. See *Johnson*, 467 F.3d at 563, 566; *Webb*, 403 F.3d at 383; *Jimenez-Beltre*, 440 F.3d at 529-30 (Lipez, J., dissenting). Any sentence that is issued without the support of an on-the-record statement of reasons, justifying the judgment by reference to the factors and purposes of

§ 3553(a), is invalid.[28] See *Johnson*, 467 F.3d at 563, 566; *Cooper*, 437 F.3d at 329-30; *Webb*, 403 F.3d at 383.

This conclusion does not change when the sentence is within the range recommended by the Guidelines, or if a presumption of reasonableness is accorded to it. Institution of a presumption of reasonableness does not alter the plain statutory command of § 3553(c) or lesson the necessity of an explanation of the district court's rationale in imposing sentence. See *Sanchez-Juarez*, 446 F.3d at 1114-17; see also *Johnson*, 467 F.3d at 563, 566; *Foreman*, 436 F.3d at 644; *Webb*, 403 F.3d at 383. A statement of reasons is required for any sentence, regardless of where it falls in the statutory range or whether it is presumed reasonable.[29] See *Sanchez-Juarez*, 446 F.3d at 1114-17.

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[28] The majority of courts have adopted this approach. *See United States* v. *King*, 454 F.3d 187, 196-97 (3d Cir. 2006); *Johnson*, 467 F.3d at 563, 566; *United States* v. *Cunningham*, 429 F.3d 673, 679-80 (7th Cir. 2005); *Feemster*, 435 F.3d at 884; *Diaz-Argueta*, 447 F.3d at 1171; *Sanchez-Juarez*, 446 F.3d at 1114-17. *But see United States* v. *Ayers*, 428 F.3d 312, 315 (D.C. Cir. 2005); *United States* v. *Scherrer*, 444 F.3d 91, 193 (1st Cir. 2006); *Talley* v. *United States*, 431 F.3d 784, 786 (11th Cir. 2006); *Fernandez*, 443 F.3d at 29-30; *Mares*, 402 F.3d at 519.

[29] That the same subsection calls for an even more detailed statement of reasons in two particular situations, *see* § 3553(c)(1), (2), does not negate the general command of § 3553(c) for an explanation of the sentence in all cases. Each of these situations presents a circumstance in which the Guidelines range proves less useful to the district court, either because it is unmanageably broad (i.e., exceeding twenty-four months) or because it has not predicted the final sentence (i.e., a non-Guidelines sentence). *See* § 3553(c)(1), (2). It is perfectly reasonable to require district courts in these cases to provide a more specific statement of reasons than that mandated generally by § 3553(c), in order to provide the Sentencing Commission, Congress, the parties, and the public with the additional information necessary to evaluate the continued viability of the Guidelines as written. *See generally* Breyer, *supra*, at 18-20 (discussing evolutionary process of Guidelines development); Stith & Koh, *supra* (same); S. Rep. No. 98-225 at 80.

In interpreting an analogous statutory scheme that employs the same "shall consider" language, this Court has recognized that district courts must articulate their compliance with a statutory regime setting forth factors to consider in exercising discretionary judgment. The Speedy Trial Act, like the Sentencing Reform Act, provides that district courts "shall consider" a series of enumerated factors in rendering judgment.[30] Implicit in this provision, as this Court held in *United States* v. *Taylor*, 487 U.S. 326 (1988), is a requirement that the district court provide a reasoned and clear explanation of the judgment:

> Where, as here, Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review. Only then can an appellate court ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent ....

Id. at 336-37. Courts of appeals can review a lower court's judgment for abuse of discretion only if they are informed whether the district court understood its discretion and how it exercised that discretion.[31] See *id.* When a statute mandates

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[30] *See* 18 U.S.C. § 3162(a)(2) ("In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.").

[31] The reasonableness review of sentencing decisions established by *Booker* is "akin" to a review for abuse of discretion, in that the appellate court is not to conduct *de novo* review, and should accord deference to the district court's factual determinations and assessment of the purposes of sentencing to be furthered in each case. But, of course, even under an abuse of discretion standard, the appellate court must determine whether the district court properly applied the law. *See Martin* v. *Franklin Capital*

consideration of several factors as a prerequisite to judgment, as does the Sentencing Reform Act, district courts are obliged to offer an on-the-record statement of the reasons supporting their decisions.[32] See *id.* at 326-27; see also Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 770 (1982) (citing K. Davis, *Discretionary Justice: A Preliminary Inquiry* 103-06 (1969)).

Reasons are not the same as conclusions. Even though some courts have held it sufficient for the district court to simply recite that it considered the § 3553(a) factors, see, *e.g.*, *Fernandez*, 443 F.3d at 29-30; *Talley*, 431 F.3d at 786; *Ayers*, 428 F.3d at 315; *Mares*, 402 F.3d at 519, such a rote recitation offers no information about how the district court decided upon the sentence ultimately imposed, and affords no opportunity for the reviewing court to determine whether the

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Corp., 126 S. Ct. 704, 710 (2005) ("[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.") (second alteration in original) (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.)). Here, § 3553(a) sets forth governing legal standards, and the reviewing court has a duty to confirm that these standards were correctly applied – i.e., to assess whether the district court has considered the sentencing factors specified in § 3553(a) without placing undue weight on the Guidelines, as dictated by the plain language of the statute. *See United States* v. *Schweitzer*, 454 F.3d 197, 204 (3d Cir.), *cert. denied*, 127 S. Ct. 600 (2006).

[32] *See also Schweitzer*, 454 F.3d at 205-06 ("There is simply no substitute for on-the-record discussion and deliberation. It ensures that the parties are fully informed of their rights and obligations and that the appellate court will be able to assess the merits of the final judgment."); *United States* v. *Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) (stating that a court cannot "infer a reasoned exercise of discretion from a record that . . . is silent"); *Extra Equipamentos E. Exotica Ltd.* v. *Case Corp.*, 361 F.3d 359, 361-62 (7th Cir. 2004) ("[B]efore the issue of abuse is even reached, the appellate court must be satisfied that the judge has exercised her discretion responsibly by considering all the salient factors that would enter into a responsible exercise."); *cf.* Steven Childress & Martha Davis, *Federal Standards of Review* § 7.06[B][3] (2004) ("The appellate court is not reviewing the decision but, instead, the manner of making it.").

statutory factors were properly weighted. In this respect, the court of appeals is in no better position than a university professor asked to grade a student paper that contains only a conclusion and a bibliography. Absent an explanation of the reasons for imposing a sentence, the appellate court cannot review the decision-making process underlying the district court's imposition of a sentence. It is only the statement of reasons that makes appellate review for "reasonableness" possible. See *Diaz-Argueta*, 447 F.3d at 1171; *King*, 454 F.3d at 196-97; *Feemster*, 435 F.3d at 884; *Cunningham*, 429 F.3d at 679-80.

The indispensable role of the statement of reasons given in open court by the sentencing judge is further confirmed by the legislative history of § 3553. Prior to 1984, district courts' discretion in sentencing was not circumscribed by statute and was virtually limitless. See generally Stith & Koh, *supra*. There was no need for an explanation of the sentence since, in the absence of governing standards, the court of appeals had no basis to overturn any judgment within the broad statutory maxima and minima.

This changed with the Sentencing Reform Act. The Act imposed clear and measurable standards by which courts of appeals could review the district courts' exercise of discretion. See § 3553(a). Articulation of the district court's judgment thus became important, to facilitate appellate review and ensure compliance with the statute. See, *e.g.*, *Johnson*, 467 F.3d at 563, 566; *Cooper*, 437 F.3d at 329-30. It was for this purpose that Congress included a provision in the Act requiring district courts to offer statements of reasons for all sentences. See, *e.g.*, S. Rep. No. 98-225, at 52. Mere lip service might have been sufficient to justify a Guidelines sentence in a mandatory regime where district courts' discretion to sentence outside of the Guidelines range was extremely limited; post-*Booker*, the district court must provide a reasoned explanation of how the statutory factors were considered in order to demonstrate that it properly exercised its discretion. The validity of a sentence, whether or not it falls within the Guide-

lines range and whether or not a presumption of reasonableness is accorded, depends on the adequacy of this explanation.

B. The District Court In This Case Failed To Provide An Adequate Explanation For The Sentence.

The brief comments offered by the district court in this case fall far short of satisfying the statutory requirement of an adequate statement of reasons. The district court merely noted, prior to imposing sentence: "The Court is unable to find that the sentencing guideline range ... is an inappropriate guideline range for that, and under 3553, certainly the public needs to be protected if it is true." J.A. 87. It did not resolve open evidentiary issues in the record, including the nature of Mr. Rita's medical conditions or his military and civil service. It did not address the relationship of those facts and others to the factors and purposes of § 3553(a). It did not assess how the final sentence to be imposed would advance the traditional goals of sentencing or whether that sentence was the least restrictive means available to further those purposes.

More was necessary. There can be no effective appellate review of a sentence when the district court fails to explain its decision by reference to the factors and purposes of § 3553(a). See *Taylor*, 487 U.S. at 326-27. The only conclusion an appellate court can draw from a judgment not supported by an adequate statement of reasons is that the district court failed to consider all relevant factors and failed to craft a penalty that was "sufficient but not greater than necessary" to satisfy the goals of § 3553(a)(2). See *Johnson*, 467 F.3d at 563, 566; *Webb*, 403 F.3d at 383. The sentence in this case was not supported by a satisfactory statement of reasons and must therefore be deemed unreasonable.

Nor can Mr. Rita's sentence be upheld on the mere basis of a presumption of reasonableness for a within-Guidelines sentence. The court of appeals disregarded record evidence that

the presumption was rebutted in this case. And, there is no basis in either the Sentencing Reform Act or in *Booker* for the sentence to have been upheld based upon the rote application of such a presumption.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Fourth Circuit, vacate the sentence, and remand to the district court for resentencing.

Respectfully submitted,

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ADDENDUM

STATUTORY ADDENDUM

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission

into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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[1] So in original. The period probably should be a semicolon.

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

> (1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
>
> (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

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[3] So in original. The second comma probably should not appear.

18 U.S.C. § 3162. Sanctions

* * * *

(a)(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

* * * *

18 U.S.C. § 3661. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation

with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. Not more than 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining suffici-ent flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not

taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 U.S.C. § 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense

involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and govern-ing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

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[1] So in original. Probably should be "incidence".

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of proba-tion, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

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[1] So in original. Probably should be "incidence".

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and

Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an of-

fense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission

a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the

grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a

format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.